INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

ALLEN I. NILVA, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 10, 1955.

CITATION TO OPINIONS BELOW

The unreported memorandum opinion of the District Court, rendered after the entry of its judgment in the course of denying a motion for suspension of sentence, is printed as Appendix A hereto. The opinion of the Court of Appeals for the Eighth Circuit,

printed as Appendix B hereto, is reported at 227 F. 2d 74. The opinion of the Court of Appeals on the denial of the petition for rehearing, printed as Appendix C hereto, is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955. Rehearing was denied on December 21, 1955. On January 16, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a criminal contempt conviction under Rule 42(b) of the Federal Rules of Criminal Procedure can be premised exclusively on prior testimony not introduced at the contempt hearing and not subject to cross-examination by counsel for the accused.

2. Whether Rule 42(a) of the Federal Rules of Criminal Procedure is applicable where the testimony before the court on the contumacious acts relates to events occurring outside the courtroom and whether, in any event, the applicability of Rule 42(a) can be used to narrow the rights accruing to a defendant in a proceeding instituted under Rule 42(b).

3. Whether petitioner's conviction for contempt can be sustained in the absence of any competent evidence establishing guilt beyond a reasonable doubt.

4. Whether other errors were committed in the proceedings below which warrant reversal or reconsideration of the conviction.

STATUTES INVOLVED

Rule 42, Federal Rules of Criminal Procedure, 18 U.S.C.A.:

(a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

On April 27, 1954, the United States District Court for the District of North Dakota found the petitioner, an attorney, guilty of criminal contempt (R. 67). The

acts constituting such contempt, the court further found, "did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster" (R. 67). Petitioner was thereupon sentenced to imprisonment for a year and a day (R. 67). On appeal, the conviction was affirmed by the Court of Appeals for the Eighth Circuit, 227 F. 2d 74; Appendix B hereto, *infra*, p. 5a.

This contempt proceeding had its origins in the retrial[1] of Christianson and Paster on charges of conspiring to violate the Johnson Act, 15 U.S.C. §1172, prohibiting the interstate shipment of gambling devices.[2] Prior to this retrial, which began March 29, 1954, the District Court, at the request of the Government, issued two subpoenas duces tecum. They were directed to the Mayflower Distributing Co. of St. Paul, Minn., a corporation wholly owned by the defendant Paster. Subpoena No. 78 was issued on February 26, 1954 (R. 26) and subpoena No. 160 was issued on March 22, 1954 (R. 24). Both required that the corporation produce certain books and records reflecting the purchase and sale of new and used coin-operated devices. They were returnable March 29, 1954, the date set for the retrial. Service was effected in both in-

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[1] At the first trial, the jury had been unable to agree as to the guilt of Christianson and Paster and a mistrial was declared. Petitioner Nilva was acquitted at this first trial and hence was not involved in the retrial.

[2] Christianson and Paster were convicted of the conspiracy charges on the retrial. Their conviction was affirmed on appeal by the Court of Appeals for the Eighth Circuit, 226 F. 2d 646. The matter is now pending before this Court on a petition for a writ of certiorari. No. 663, October Term, 1955.

stances on Walter D. Johnson, Secretary-Treasurer of the Mayflower Distributing Co. (R. 25, 27-28).

The Court of Appeals noted, in reliance on a supplemental record filed before it by the Government over petitioner's objection that it contained matters not introduced at the contempt hearing,[3] that the subpoenaed records were not produced on March 29, the return date. Instead, the defendant Paster moved on that day to quash the subpoenas as violative of his privilege against self-incrimination, a motion that was denied (S. R. 21, 25-26). The Government thereupon orally moved, under Rule 17(c) of the Federal Rules of Criminal Procedure, that the books and records be produced forthwith and the court so ordered (S. R. 27).

On April 1, 1954, the third day of the Christianson-Paster trial, petitioner Nilva voluntarily appeared in answer to the subpoenas and the forthwith order (R. 8-9). A hearing was held on that day in the trial judge's chambers (R. 5). Government counsel indicated the belief that petitioner had not produced all the subpoenaed records, that what was produced related only to new machines and not to used machines (R. 6). Petitioner was thereupon put under oath and examined by Government counsel (R. 8-24). He

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[3] Petitioner filed in the Court of Appeals a motion to strike all portions of the supplemental record and of the Government's brief which related to matters not made part of the record before the District Court in the contempt proceeding. Most of this supplemental record consisted of pleadings, orders, exhibits, excerpts of testimony and other proceedings in the Christianson-Paster conspiracy trial, practically none of which was incorporated by reference or otherwise introduced into the record of petitioner's contempt case. The motion was denied. 227 F. 2d at 79, fn. 2; Appendix B, *infra*, p. 12a, fn. 2.

testified that he was the vice-president of the Mayflower Distributing Co. (R. 8) and that he had "brought all the records that [he] could that those subpoenas asked for" (R. 9). He testified further (R. 9) to the effect that many of the requested records had been subpoenaed for use in another criminal case then pending before the Court of Appeals for the Eighth Circuit.[4] And he stated that he was but a nominal officer of the corporation and was not the best qualified to testify as to the bookkeeping records (R. 11).

Petitioner further described the magnitude of the task of attempting to comply with subpoenas of such breadth through a search of "thousands" of records (R. 17-19). He readily admitted that he may not have examined daily ledgers and he declined to state that he had examined monthly journals (R. 17). He unhesitatingly acknowledged that purchases of new equipment would be shown in running accounts rendered by the manufacturers from whom such purchases were made, and that records of such accounts could easily be found among Mayflower's records (R. 20). But he never suggested that such accounts and records had been produced. Moreover, petitioner made it clear that he had not personally conducted the entire search but had been assisted by office employees (R. 9, 15, 17). He expressly denied any knowledge of bookkeeping methods or of the contents of specific records (R. 9, 10, 17, 19). Repeatedly he refused to respond categorically to questions as to the contents of corporate records and he qualified his answers as

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[4] *Nilva* v. *United States*, 212 F. 2d 115 (C.A. 8), cert. den., 348 U. S. 825. The appellant in that case was Samuel George Nilva, not the petitioner in the instant proceeding.

to the search he had made as being thorough "to the best of my ability" (R. 14, 15, 16, 18). Nowhere did he claim to have produced any specific records other than "compiled" records relating to used machines and all "incoming invoices" for certain months relating to new machines (R. 8, 18).

The trial judge later stated (Appendix A hereto, *infra*, p. 2a)[5] that at its conclusion he had considered petitioner's testimony at this April 1 hearing to be evasive and accordingly he had granted the Government's request for an order impounding all records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn. The records thus impounded, according to the contested supplemental record (S. R. 34), consisted of thousands of documents filling a "post office truckful." And that record indicated that on April 8 the Government asked for and received a delay of one day in the Christianson-Paster trial proceedings in order that these documents might be examined and analyzed. The judge later ordered (S. R. 39-44) that the petitioner not leave the jurisdiction of the court without permission.

In the subsequent words of the trial judge (Appendix A hereto, *infra*, p. 2a): "Action on the

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[5] This statement was made in the judge's memorandum opinion denying the motion for suspension of the sentence, an opinion which was rendered after the entry of the contempt judgment. It has been held that an opinion announced after the verdict is rendered which states merely the course of reasoning which conducted the court to its judgment "may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record." *Williams* v. *Norris*, 25 U. S. (12 Wheat.) 117, 118.

matter was deferred until after the jury verdict in the case of U. S. v. Christianson, et al., because it was the Court's desire that the jury should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way. There was no doubt that the jurors were not only aware of Nilva's close connection with one of the defendants but also due to widespread public interest in the trial, were aware of the fact that Nilva had at one time been a co-defendant in the case and had been found not guilty in a previous trial thereof."

On April 23, 1954, the day after Christianson and Paster had been found guilty of the alleged conspiracy, the District Court pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure issued an order to show cause (R. 2-4) why petitioner should not be held in criminal contempt for obstructing the administration of justice by:

(1) Giving false and evasive testimony under oath on April 1, 1954, upon answering, as vice-president of the Mayflower Distributing Co., subpoenas duces tecum directed to that company in the Christianson-Paster criminal case.

(2) Disobedience to subpoena duces tecum No. 78, in that five named articles were not produced as required thereby.

(3) Disobedience to subpoena duces tecum No. 160, in that twenty-two named articles were not produced as required thereby.

The order, which was issued on Friday, April 23, was returnable on Tuesday, April 27, at 10 A.M. (R. 2). At the hearing on the morning of April 27, petitioner's counsel asked for additional time (R. 33) in order to

prepare a proper defense. It was explained that other commitments of counsel had prevented more than a brief contact with petitioner during the preceding four days, which included a week-end. The request for additional time was denied except to the extent that the matter was continued until 3 P.M. that same day. During the morning hearing, a request for a bill of particulars (R. 32, 36) as to the first specification of contempt—the giving of false and evasive testimony—was also refused (R. 36-37).

At the afternoon hearing, the court stated to petitioner's counsel that "This being an order to show cause . . . I believe the burden is on you to proceed" (R. 29). At petitioner's request, his testimony at the April 1 hearing was made part of the record in the contempt proceeding, together with subpoenas No. 78 and No. 160 (R. 38). Petitioner thereupon testified in his own behalf (R. 38-58), introduced fifteen exhibits, and was cross-examined by Government counsel (R. 62-67). Petitioner's testimony revealed that he was an attorney who worked in a legal capacity for the Mayflower Distributing Co. (R. 39) and that he was the brother-in-law of Herman Paster, the sole owner of that corporation (R. 40).

Government counsel presented no witnesses and introduced no evidence at the contempt hearing apart from moving that the transcript of testimony of one Richard N. Peterson at the Christianson-Paster conspiracy trial be made a part of the contempt proceedings (R. 59). According to the Court of Appeals, 227 F. 2d at 77, *infra*, p. 9a, Peterson was an F.B.I. agent "who prepared and testified from a memorandum he made from the impounded records which showed the slot machines purchased by the Mayflower

Company during the period inquired of Nilva about on April 1, 1954."

Petitioner's counsel objected to the introduction of this transcript on the ground of hearsay and lack of opportunity to cross-examine Peterson (R. 60). The objection was overruled and the transcript was admitted (R. 61). In this connection, petitioner testified that he was not present at the time Peterson testified in the conspiracy case (R. 60) and that while he had been an attorney for the defendant Paster at an early motion stage of the conspiracy case he had thereafter withdrawn and had no part in any of the subsequent proceedings (R. 61).

At the close of petitioner's testimony, the District Court found petitioner guilty of criminal contempt and sentenced him to imprisonment (R. 67). It was also ordered, though not as part of the sentence, that petitioner never again be allowed to practice in the District Court in North Dakota (R. 67). The conviction was sustained on appeal to the Court of Appeals for the Eighth Circuit, 227 F. 2d 74; Appendix B hereto, *infra*, p. 5a. That court held that the conviction under Rule 42(b) could be based exclusively on prior testimony given in the conspiracy trial and not introduced in the contempt proceeding since the petitioner was an attorney of record in the conspiracy case and could have cross-examined any witnesses in that case whose testimony was relevant to the contempt, or he could have called such witnesses for cross-examination at the contempt hearing. In its opinion denying the petition for rehearing, Appendix C, *infra*, p. 16a, the court added that petitioner was in no position to complain about the use of such prior testimony since he could have been subjected to the summary procedure of Rule 42(a).

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Matusow* v. *United States,* F. 2d , decided January 27, 1956, on important and hitherto unresolved issues growing out of criminal contempt proceedings instituted under Rule 42(b) of the Federal Rules of Criminal Procedure. The decision below also directly conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Bowles* v. *United States,* 44 F. 2d 115, and with pertinent principles established by this Court, with respect to the applicability of Rule 42(a) to a proceeding of this nature, and with respect to the proof necessary to sustain a contempt conviction. Because of these conflicts and because the case involves important problems in the administration of criminal justice in the federal courts, the grant of a writ of certiorari is appropriate in this proceeding.

1. The decision below directly conflicts with the Matusow decision as to whether a criminal contempt conviction under Rule 42(b) can be premised exclusively on prior testimony not introduced at the contempt hearing and not subject to cross-examination by counsel for the accused.

The Court of Appeals in this case held that, in determining whether petitioner was guilty of contempt in a proceeding instituted under Rule 42(b), the trial court could take cognizance of evidence adduced at the previous Christianson-Paster conspiracy trial in connection with which the alleged contempt was committed. It held that all of the incidents occurring in the previous trial which show the contempt need not be again proved in the contempt hearing, at least where the person charged with

contempt was a party or of counsel in the prior trial. 227 F. 2d at 78-79; Appendix B, *infra*, pp. 11a-12a.

Thus, in sustaining the trial court's determination based on prior testimony of witnesses before it, the Court of Appeals referred only to testimony given in the prior conspiracy trial. "It was the evidence adduced at the *Christenson* trial," said the court, "particularly that of Agent Peterson, which showed that Nilva's testimony was false." 227 F. 2d at 78; Appendix B, *infra*, p. 11a. And as evidence of the willfulness of petitioner's testimony and his knowledge of Mayflower's records, the court pointed to the testimony of one James Christenson in the prior conspiracy trial. 227 F. 2d at 77; Appendix B, *infra*, p. 9a.

Not so much as a fleeting oral reference to the Christenson testimony was made at the contempt hearing, although a transcript of the Peterson testimony was introduced. In other words, at no time was petitioner confronted by Peterson, Christenson or any other witness, or given an opportunity to cross-examine them in relation to the subject matter of the contempt trial. Nor was there any showing that any of these witnesses were unavailable at the time of the contempt hearing.

In *Matusow* v. *United States*, F. 2d , decided January 27, 1956, the Court of Appeals for the Fifth Circuit squarely held that a contempt proceeding under Rule 42(b) requires confrontation by all witnesses against the accused and an opportunity to cross-examine them in the plenary contempt hearing. At the Matusow contempt hearing, as in this case, the Government introduced no proof whatever apart from submitting a transcript of evidence of a prior

motion for a new trial in an independent criminal proceeding wherein Matusow had submitted an allegedly false affidavit. The trial court, in finding Matusow guilty of contempt, relied on testimony given before it in open court by other witnesses in the original criminal trial and on the motion for a new trial. After fully discussing the pertinent authorities in this Court, the Court of Appeals reversed the contempt judgment and stated (slip opinion, p. 24):

> Nor was appellant confronted with the witnesses against him or afforded the opportunity of cross-examination. The Court below had concluded that appellant committed perjury not only from having heard him testify twice, but from testimony given in open court by other witnesses both at the trial of Jencks and on the hearing of the motion for new trial. Appellant was, under the authorities above discussed, entitled to have that testimony given in a plenary proceeding at which his attorney had the right of cross-examination.

Thus the *Matusow* holding flatly contradicts the ruling below that contempt can be proved merely by reference to testimony in prior proceedings and that it is unnecessary to prove in the contempt proceedings all the incidents demonstrating the contempt. The confrontation and cross-examination emphasized in the *Matusow* case have meaning only in relation to a requirement—which the court below denied—that all the elements of contempt be proved in the plenary contempt hearing.

The conflict between these two rulings is not made less irreconcilable by reason of the finding below that petitioner was an orney of record for defendant Paster at an early m tion stage of the Christianson-

Paster conspiracy proceeding. The Court of Appeals sought to impart significance to that fact by stating that, while petitioner did not participate in the conspiracy trial and did not sit at the counsel table, there was no reason why he could not have done so had he desired; thus he could have cross-examined Peterson at the conspiracy trial as Paster's attorney and accomplished as much as by cross-examining him at the contempt hearing. Moreover, said the court, petitioner could have called Peterson at the contempt hearing, along with the records, for the purpose of showing any inaccuracies in Peterson's summarization of them. 227 F. 2d at 78; Appendix B, *infra*, p. 11a.

Apart from the undenied fact that petitioner did not actually participate in the conspiracy trial as an attorney for Paster, petitioner did not know and could not know at the time of Peterson's testimony that it would later be used as proof of the contempt. The order to show cause why he should not be held in contempt was not issued until eleven days after Peterson testified. Even if petitioner had known definitely that contempt proceedings would later be brought, any cross-examination of Peterson at that point as to the issues involved in the contempt proceeding would have been ruled out as irrelevant to the conspiracy trial. As the trial judge later stated, Appendix A, *infra*, p. 2a, the court was anxious not to permit the jury to learn of the impending contempt matter so that the conspiracy defendants would not be prejudiced thereby. And certainly it was not petitioner's burden at the contempt trial to call for cross-examination all witnesses who had previously testified in an independent criminal proceeding and

whose testimony might or might not be subsequently utilized by the court in determining guilt on the contempt charge.

If the *Matusow* case be correct, petitioner had a right under Rule 42(b) to be confronted by Peterson and to cross-examine him at the contempt hearing. And, in the words of the *Matusow* ruling, petitioner was entitled to have Peterson's testimony "given in a plenary proceeding *at which his attorney had the right of cross-examination*" (emphasis added). In other words, despite the fact that petitioner himself was an attorney, he had a right to have counsel of his own choosing for purposes of the contempt proceeding. The right of cross-examination is one that is normally exercised by one's counsel. And exercising that right through counsel is appropriate here only in the independent contempt proceeding. To attempt to exercise it through counsel in a separate and disconnected criminal trial would be both futile and chaotic.

The error and confusion inherent in the ruling below is occasioned in part by a failure to appreciate that a proceeding in criminal contempt is a separate and independent proceeding at law. *Parker* v. *United States*, 153 F. 2d 66, 70 (C.A. 1). It is not a part of the case out of which the contempt arose. *Russell* v. *United States*, 86 F. 2d 389, 392 (C.A. 8). Only by maintaining a sharp demarcation between the contempt proceeding and the case from which it sprang, a demarcation that cuts through matters of evidence, can the rights of the individual accused of contempt be properly protected.

The issue thus raised by the decision below is of obvious and substantial importance, meriting the

attention of this Court. Never before has a criminal conviction been affirmed in a federal appellate court by reliance on the prior testimony of witnesses who, though presumably still available, are not called at the trial so that the accused may be confronted by them and subject them to cross-examination through counsel of his own choosing. To permit the judgment below to stand is to twist a Rule 42(b) proceeding into a vehicle for imposing criminal sanctions in violation of the most basic elements of due process and fair play, contrary to the intent of Rule 42(b).

The decision below is contrary to the "undoubted tendency" of this Court, noted by the Court of Appeals in the *Matusow* case (slip opinion, p. 21), "to observe, as far as may be, in the narrowly restricted area conceded to be covered by Rule 42(b), the protection given to defendants in criminal trials under the Bill of Rights." It is contrary to this Court's expression in *In re Oliver*, 333 U. S. 257, 272, that in a contempt proceeding as elsewhere, "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in Court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

2. The decision below directly conflicts with the Matusow and Bowles decisions as to the applicability of Rule 42(a) to a contempt case of this nature and the decision constitutes an unwarranted intrusion on the rights attendant on a proceeding instituted under Rule 42(b).

Despite the fact that the contempt proceeding against petitioner was premised in the trial court exclusively on Rule 42(b) of the Federal Criminal Rules,

the Court of Appeals held in its opinion denying the petition for rehearing (Appendix C, *infra*, p. 17a) that the trial court "could, we think, properly have proceeded summarily against Nilva for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure."[6]

In effect, the court held that since petitioner might have been subjected to summary procedure under Rule 42(a), he was not in a position to complain about any short-cuts or deficiencies in procedure that might have occurred in the proceeding instituted under Rule 42(b). This ruling given in the opinion on rehearing serves to explain the summary rejection given in the court's original opinion to many of petitioner's claims that the procedural requirements expressed and implied in Rule 42(b) had not been followed and that he had been denied a fair trial. See 227 F. 2d at 79-80; Appendix B, *infra*, pp. 13a-14a.

The court's holding that Rule 42(a) was applicable was premised on the belief that the conduct of Nilva found to have been contumacious and obstructive was committed wholly within the presence of the trial judge. If that were not so, said the court below, "the introduction of the evidence of which Nilva complains would present a serious question." Appendix C, *infra*, p. 17a. In the court's words, "It was the conduct of Nilva which occurred in the presence of the District

[6] The District Court was also of the same view. Thus, in the contempt proceeding, the trial judge stated (R. 30): "I think in this instance the Court could have, if it desired, proceeded under paragraph (a) of Rule 42 summarily without giving any time at all." But the judge did not certify, as required by Rule 42(a), that he saw or heard the conduct constituting the contempt and that it was committed in his actual presence.

Court and the evidence introduced relative thereto during the trial of Christianson and Paster which resulted in the subsequent contempt proceeding against Nilva." Appendix C, *infra*, p. 17a. Since Rule 42(a) was thus held applicable, the court below felt that the fact that the District Court chose to proceed under 42(b) meant merely that petitioner had "more adequate opportunity to produce evidence in explanation, exculpation or mitigation of his conduct." Appendix C, *infra*, p. 17a. But in the court's view he did not thereby become entitled to any of the benefits of due process and fair treatment which adhere to a normal proceeding under Rule 42(b), a proceeding to which Rule 42(a) would be totally inapplicable.[7]

The decision below as to the relevance of Rule 42(a) is in direct conflict with the ruling of the Court of Appeals for the Fifth Circuit in *Matusow* v. *United States*, F. 2d , decided January 27, 1956, and with the ruling of the Court of Appeals for the Fourth Circuit in *Bowles* v. *United States*, 44 F. 2d 115. In the *Matusow* case, the trial judge purported to act solely on the basis of testimony taken before him on various occasions, testimony which indicated that Matusow had perpetrated a fraud in filing an affidavit in the court. This testimony, however, concerned dealings between Matusow and others at points far

[7] Thus the court said: "The fact that the trial court elected to proceed under Rule 42(b) rather than under Rule 42(a) did not, in our opinion, place Nilva in any stronger position with respect to the admission of evidence to substantiate the charge that his conduct constituted contempt than he would have been in had he been proceeded against under Rule 42(a), although it gave him a better opportunity to defend against the charge." Appendix C, *infra*, pp. 17a-18a.

distant from the place of the trial court. The Court of Appeals for the Fifth Circuit held that Rule 42(a) was inapplicable because the events which formed the basis for the judge's conclusion that Matusow's testimony was perjured took place out of the presence of the trial court.

In the *Bowles* case, the trial judge, on the basis of evidence before the court, had summarily found the defendant guilty of contempt for having falsely represented himself as a practicing attorney. Summary procedure, now codified in Rule 42(a), was held by the Court of Appeals to be inappropriate since the facts which demonstrated the inaccuracy of the representation, facts dealing with the defendant's disbarment, occurred outside the court's presence.

And so in this case it was not enough that the testimony which was thought to demonstrate or bear on the falsity of petitioner's testimony was all given before the trial judge. The facts which bore upon the contumacious nature of petitioner's testimony before the court and his response to the subpoenas were all matters occurring outside the presence of the trial court. Those facts related to the true nature of the records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn., and the extent and good faith of the search of those records in St. Paul which petitioner had made. These were matters which the trial judge could not certify as having seen or heard or as having taken place in his actual presence, as required by Rule 42(a). The ruling below to the contrary is thus in conflict with the *Matusow* and *Bowles* decisions.

Moreover, there was no competent evidence that petitioner's testimony, correctly understood (see p. 22,

infra), was designed to suppress germane records or to delay the conspiracy trial or that such testimony in any other way obstructed the administration of justice. Nor was it within the judicial knowledge of the court that petitioner's testimony was in fact false. See Note, *Falsification as Contempt*, 7 Vand. L. Rev. 272 (1954). There was thus left applicable the basic rule that the mere giving of false and evasive testimony is not contempt in the absence of an obstructive effect on the administration of justice. *In re Michael*, 326 U. S. 224; *Ex parte Hudgings*, 249 U. S. 378.

Rule 42(a), as this Court recognized in *Sacher* v. *United States*, 343 U. S. 1, 9, "contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial." As Mr. Justice Black pointed out in that case, this power of summary contempt "grew out of the need for judicial enforcement of order and decorum in the courtroom and to compel obedience to court orders." 343 U. S. at 22. See also *Ex parte Terry*, 128 U. S. 289, 303, and *Offutt* v. *United States*, 348 U. S. 11, 14. Rule 42(a), in other words, concerns matters of decorum and conduct occurring wholly within the courtroom. To extend it to testimony before the judge as to matters occurring far beyond the confines of the courtroom, as the court below attempted to do, is to expand the rule beyond its intended limitations and to widen unnecessarily the area within which due process requirements can be ignored in contempt proceedings.

The decision below thus raises a significant issue deserving of further review by this Court. The importance of that issue is enhanced by the fact that the

Court of Appeals utilized its erroneous view of the applicability of Rule 42(a) to restrict petitioner's rights in a proceeding instituted and developed solely under Rule 42(b). Never before has a federal appellate court held that a defendant's rights may be restricted solely because he might have been—but was not—prosecuted under another provision of law. A most serious departure from the accepted and usual course of judicial proceedings has taken place which requires the exercise of this Court's powers of supervision.

3. There was a complete absence of any competent evidence to sustain the conviction for contempt.

The court below recognized the rule that in criminal contempt proceedings the defendant is presumed to be innocent and that guilt can be found only on proof beyond a reasonable doubt. 227 F. 2d at 80; Appendix B, *infra,* p. 14a. But the court failed to look for or to find the existence of any competent evidence from which it could be concluded beyond a reasonable doubt that petitioner had given false or evasive testimony or disobeyed the two subpoenas. Indeed, there was no such competent evidence.

The court below, doubtless influenced by misstatements in the Government's brief below (Brief, pp. 3, 10), misconceived the nature of petitioner's testimony which was found to be false and evasive. And it was thereby led to misconceive the nature of the competent evidence which was necessary to sustain the Government's burden of proof. The court stated that petitioner had sworn that he had made a diligent search of the Mayflower records and that "the records he produced were all of the records of purchases except the records which were on file in the United States

Court of Appeals in the Minnesota case." 227 F. 2d at 76; Appendix B, *infra*, p. 7a. The court then proceeded to find, from the evidence adduced in the conspiracy trial, that this supposed testimony of petitioner had been proved false. There was competent evidence, said the court, to demonstrate "the falsity of Nilva's testimony that there were no more records of purchases by Mayflower during the period in question except those on file in the Court of Appeals." 227 F. 2d at 78; Appendix B, *infra*, p. 11a. The court found, moreover, that justice was obstructed by petitioner's testimony "that the records he produced and those which were in the Court of Appeals were the only records in existence relating to the subject matter he was examined about." 227 F. 2d at 79; Appendix B, *infra*, p. 13a.

But as previously noted, *supra*, p. 6, petitioner never in fact testified that he had brought all the records except those on file in the appellate court. He stated merely that he had searched through thousands of records, with the aid of office employees, and had brought those which to the best of his knowledge and ability were required and available. He readily admitted that he may not have examined certain records, a fact of particular relevance in light of his lack of knowledge of bookkeeping methods and of the contents of specific records. See R. 8-20.

Evidence that there were in fact records which were not on file in the appellate court and which were not produced by petitioner was thus inadequate to prove the falsity or evasiveness of petitioner's testimony. The falsity of such testimony could be shown only by evidence that petitioner did not make a diligent search to the best of his ability and that the records which he

admittedly did not bring were withheld in order to frustrate the orders of the court. And only by such evidence could it be demonstrated that petitioner had disobeyed the two subpoenas.

There was, however, no evidence whatever contradicting the testimony of petitioner, testimony which was further illuminated by petitioner in his examination at the contempt hearing (R. 38-67). As he reiterated at that contempt hearing (R. 54), "I produced such items as I could find and that I was told that the Government was interested in in connection with the main lawsuit." There is not one word of testimony by any of the witnesses in the conspiracy trial—even assuming such testimony to be admissible—which denies that petitioner made a diligent search within his capacities or that he intentionally held back any records he knew should be produced. Indeed, the testimony of Peterson and the other conspiracy trial witnesses on which the court below relied was necessarily confined to the issues involved in that trial. Those witnesses were not concerned with or asked about the truth or falsity of petitioner's testimony, a matter which the trial judge said he wanted to keep from the jury. Appendix A, *infra*, p. 2a.

Thus there was a complete failure of proof beyond a reasonable doubt that petitioner was guilty of contempt as charged in the order to show cause. That failure of proof is an important issue meriting the consideration of this Court. Particularly is such consideration appropriate where, as here, the court below has flagrantly and negligently misunderstood the nature of the allegedly false testimony and the character of the evidence essential to demonstrate the guilt of petitioner. That misunderstanding in effect

served to remove from petitioner the presumption of innocence as to the alleged falsity of his actual testimony and to make it unnecessary for the Government to prove such falsity beyond a reasonable doubt.

The facts and issues in these respects were properly presented and urged by petitioner in the court below. Its failure to respond to those facts and issues has made a useless formality out of the appellate review. Here again the supervisory powers of this Court must be invoked in order that petitioner may secure the proper appellate review of his conviction to which he is entitled.

4. Other errors committed below warrant review by this Court.

Certain other errors were committed in the proceedings below which, in conjunction with the above-discussed grounds for review, merit review and correction by this Court:

a. The court below committed plain error in denying petitioner's motion to strike those portions of the supplemental record which had not been incorporated by reference or otherwise introduced into the record of this contempt case. As stated in *United States ex rel. Collins* v. *Ashe*, 176 F. 2d 606, 607 (C.A. 3),

> It is so well established as not to require discussion, however, that a district court of the United States must base its decision on evidence actually in the record of the case and that the appellate tribunal cannot base an adjudication on items of evidence informally offered in the trial court and, though apparently read by it, not made a part of the record.

Moreover, the supplemental record not having been presented to the trial court for inclusion in the record,

the Court of Appeals lacked authority to add it to the record. *Heath* v. *Helmick*, 173 F. 2d 156 (C.A. 9); *Washington* v. *United States*, 14 F.R.D. 221 (D.C. Ken.).

b. The trial court erred in denying petitioner sufficient time in which to prepare his defense. Under Rule 42(b), one accused of criminal contempt is entitled to "a reasonable time for the preparation of the defense." While the reasonableness of the time allowed will vary from case to case, the facts here (see pp. 8-9, *supra*) demonstrate that the four days allowed, including a weekend, to permit petitioner to secure counsel and to enable that counsel to familiarize himself with the case and prepare an adequate defense were entirely inadequate. This case involved extensive testimony and multitudinous documents. Due process under Rule 42(b) required that more than four days be allowed to answer so serious and complicated a charge as was here involved. See *United States* v. *Aberbach*, 165 F. 2d 713, 714 (C.A. 2) (ten days held reasonable); *United States* v. *McGovern*, 60 F. 2d 880, 882 (C.A. 2) (six days given to answer).

c. The trial court erred in admitting and considering the transcript of testimony by Richard N. Peterson for the additional reason that such transcript, assuming it to be otherwise admissible in the contempt proceeding, involved a mere summation and tabulation made from voluminous records seized from the Mayflower Distributing Co. Unless it could be shown that the original records were destroyed or were otherwise unavailable, the records themselves are the primary evidence of their own existence. Where, as in the contempt proceeding, the existence of such documents is the prime issue, testimony about the documents is

secondary and explanatory only. See 4 Wigmore on Evidence (3d ed.) §§ 1192, 1244(4).

d. Subpoenas No. 60 and No. 178, in calling for the production of "all" records of purchases and sales between certain dates and pertaining to dealings with named individuals, were obviously not intended to produce evidentiary materials but were merely "fishing expeditions" to see what might turn up. As was held by this Court in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 221, one should not be held in contempt under such broad, unlimited subpoenas. The court below erred in holding to the contrary. 227 F. 2d at 80; Appendix B, *infra,* p. 14a.

e. A substantial question exists whether the trial court abused its discretion in sentencing petitioner to imprisonment for a year and a day. In view of the entire record and the nature of the offenses charged, petitioner maintains that the sentence was excessively severe. In no similar reported contempt case has such a long sentence been imposed or sustained. See *Sacher* v. *United States,* 343 U. S. 1 (six months' sentence); *Offutt* v. *United States,* 348 U. S. 11 (ten days' sentence reduced by Court of Appeals to forty-eight hours); and see *United States* v. *Patterson,* 219 F. 2d 659, 660 (C.A. 2).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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